CHEAH CHENG HOC

v.

PUBLIC PROSECUTOR

SUPREME COURT, KUALA LUMPUR
LEE HUN HOE CJ (BORNEO)
WAN SULEIMAN SCJ
SYED AGIL BARAKBAH SCJ
[FC CRIMINAL APPEAL NO. 28 OF 1984]
17 SEPTEMBER 1985

CRIMINAL LAW AND PROCEDURE: *Contempt of Court - Duties of Counsel - Breach of duty during trial - Suppressing of evidence in the face of the Court - Abuse of the Court's process - Duty to client and Court - Power of summary punishment.*

The appellant was charged with breach of duty as Counsel during a trial while representing his client. In earlier proceedings, the State Government of Trengganu (plaintiff) had sued Solomon Thuraiappah Holdings Sdn. Bhd. (defendant) for specific performance of a contract for the sale of certain premises. Three other purchasers of lots in the premises intervened in the proceedings. The plaintiff and the defendant had since come to terms and this left the three interveners to sort out their disputes with the defendant. The appellant appeared for the 2nd intervener.

The facts in brief were that there were two relevant documents with conflicting dates, one was P4 and the other CP5. The appellant, on his witnesses' evidence, relied on P4 and withheld CP5. After hearing the defendant's Counsel did he then realise that P4 could not be the right document. The appellant then tried to put in CP5 but the learned Judge took a very serious view of the matter as the appellant knew all along about CP5 but suppressed it until confronted by the defendant's Counsel's evidence. The learned Judge therefore charged the appellant for contempt of Court for suppressing evidence in the face of the Court and the appellant was sentenced to three days' imprisonment. This is an appeal from that decision.

Held:

[1] The Court has power to punish as contempt any misuse of the Court's process. Whether the Court should deal with the contempt summarily would depend upon the situation in each particular case.

[2] In the present case it is clear that the learned Judge was misled on an important matter, that is, the concealment of a document (CP5) as to affect the credibility of a witness even though it did not directly relate to the issue in the action.

[3] It is very important for a Counsel to remember that whatever may be his duty to his client his duty to the Court remains paramount in the administration of justice.

[4] The power of summary punishment is a necessary power to maintain the dignity and authority of the Judge and to ensure a fair trial. This power must be used sparingly but fearlessly when necessary to prevent obstruction of justice.

[5] The learned Judge was right in this case to find the appellant guilty but the penalty imposed was rather harsh in the circumstances. Sentence was varied with the option of a fine.

[Appeal dismissed.]

Cases referred to:
Jaginder Singh & Ors. v. Attorney-General [1983] CLJ (Rep) 176
Tombling v. Universal Bulb Co. Ltd. [1951] 2 TLR 289
Meek v. Fleming [1961] 2 QB 366; [1961] 3 All ER 148
Balogh v. Crown Court [1974] 3 All ER 283

For the appellant - Raja Aziz Addruse (Sri Ram with him); M/s. Sri Ram, Zulkifly & Kumar
For the respondent - K.N. Segara, SFC
Watching Brief (For the defendant) - A Kanesalingam

JUDGMENT

Lee Hun Hoe CJ (Borneo):

The appellant, an advocate and solicitor, was charged and convicted for contempt and sentenced to three days' imprisonment by the learned Judge. The charge arose out of an alleged breach of duty as Counsel during a trial while representing the 2nd intervener. We dismissed the appeal but varied the sentence by imposing a fine of RM1,000 or three days' imprisonment in default of payment. We stated we would give our reasons. We do so now.

Briefly, the State Government of Trengganu (plaintiff) sued Solomon Thuraiappah Holdings Sdn. Bhd. (defendant) for specific performance of a contract for the sale of the premises known as the Solomon Court. Three other purchasers of lots in the premises intervened in the proceedings. The plaintiff and the defendant had since come to terms leaving the three interveners to sort out their disputes with the defendant. When the case came up for hearing on 29 May 1984 it was agreed that the claim of the 2nd intervener be dealt with first. Encik Cheah Cheng Hoc appeared for the 2nd intervener and Encik A. Kanesalingam for the defendant.

After the close of the defendant's case Encik Cheah applied to recall Encik Tee Ching Huat, a director of the 2nd intervener, in order to put in a document (CP5) written by Encik Andrew Ch'ng on 27 June 1980. He explained that he came to know of that document only on 28 May 1984, the day before the hearing. He decided, after discussing with his client, not to produce the document so as not to confuse the Court.

The 2nd intervener's story is that the agreement was signed sometime in May 1980 and collected by Encik Andrew Ch'ng from the 2nd intervener on 4 June 1980 as evidenced by the document marked (P4). On the other hand, the defendant's story is that there was no such agreement in existence in May 1980. Encik Rekhraj, whose firm acted for the defendant, gave evidence to the effect that the agreement was ready for signature on 25 June 1980. He said his secretary received from a person called Andrew a note which reads:

> Kindly allow bearer to collect the sale and purchase agreement for Messrs. Tee Hup Seng Holdings Sdn. Bhd. so that we can get it signed by the directors of the company.

As a result he wrote to the defendant a letter dated 25 June 1980, containing, *inter alia*, the following:

> We refer to this morning telephonic conversation with your Mr. Andrew and now forward herewith four (4) copies of the Sale and Purchase Agreements to enable you to have the said documents executed by two (2) Directors at the places marked `X' in pencil and the affixing of the common seal at the place marked `Y'.

He said he never got back the agreements.

Encik Cheah realised that if Encik Rekhraj's story was true then (P4) made no sense as there was no agreement in existence until 25 June 1980. So, he sought to put in (CP5) which is in the handwriting of Encik Andrew Ch'ng and reads as follows:

> 27 June 1980
>
> Dear Adam,
>
> Please sign up these agreements and get your sister to sign with the company's seal.
>
> Meantime, please advise Kenny to prepare cheque for the fees of RM720 in the name of Solomon Thuraiappah Holdings Sdn. Bhd.
>
> Please hand over the Pangkor Court Tourist Complex documents to Kenny for reference.
>
> Thanks.
>
> Signed Andrew Ch'ng.

So, on 28 May 1984 there were two documents with conflicting dates. Faced with such a situation the appellant questioned both Encik Adam Tee and Encik Andrew Ch'ng. They could not explain about the discrepancies but merely said that as (P4) was prepared by a firm of professional auditors it must be correct. The appellant never took the trouble to check with the firm of auditors as to the correctness of the date before he took the stand to withhold (CP5). After hearing Encik Rekhraj he realised that the date stated in (P4) could not be right. So, he tried to put in (CP5) and to recall Encik Tee Ching Huat in order to establish the credibility of the witness. Not surprisingly, the learned Judge took a very serious view of the matter as the appellent knew all along about (CP5) but suppressed it until confronted by Encik Rekhraj's evidence.

On these facts the learned Judge charged him for contempt for suppressing evidence in the face of the Court. Raja Aziz Addruse with Encik Sri Ram appeared for the appellant and Encik K.N. Segara for the respondent. It was submitted that the learned Judge was wrong to convict the appellant. The Court must be satisfied that he deliberately tried to mislead the Court. The burden of proof was that applicable in a criminal case. There was no proper charge against him. It was said that the date of the agreement was not really relevant. He was not deliberately concealing the document. Also, he had apologised to the Court for the step he took. If the date was not really relevant then there was no reason for him to withhold the document. He should produce it and examine his witnesses on it and leave it to the Court to decide. The charge was clear. Encik Cheah could not say he did not understand it. He was given every opportunity to defend himself.

Both Encik Segara and Encik Sri Ram referred to a letter dated 22 April 1980 which was written to the 2nd intervener as follows:

> We act for Messrs. Solomon Thuraiappah Holdings Sdn. Bhd. who have instructed us to prepare an Agreement for the sale of the above property.
>
> We shall be pleased if you could kindly call on us at your earliest together with your Common Seal to execute the documents which is now ready for execution.

Hence, Encik Sri Ram said the learned Judge was wrong to say that the agreement was not in existence in May 1980. The point is that the agreement was never in the possession of and signed by the 2nd intervener in May, 1980 but was only collected by Encik Andrew Ch'ng on or after 25 June 1980. Very properly, Encik Segara pointed out that in the light of that letter the 2nd intervener tried to show that the agreement was executed in May 1980.

For that reason the 2nd intervener was advised to rely on (P4) which was dated 4 June 1980 and to withhold (CP5) which was dated 27 June 1980. There is no doubt that the 2nd intervener was trying to build a case that the agreement was signed in May 1980, although the statement of claim alleges June 1980.

The Court has power to punish as contempt any misuse of the Court's process, e.g. forging or altering of Court documents or other deceits of the kind or deceiving the Court by deliberately suppressing a fact or giving false facts. Whether the Court should deal with the contempt summarily would depend upon the situation in each particular case. In *Jaginder Singh & Ors. v. Attorney-General* [1983] CLJ (Rep) 176 the Federal Court made clear that the summary contempt procedure should rarely be resorted to except in those exceptional cases where it is urgent and imperative to act immediately to preserve the integrity of the trial in progress.

The learned Judge has dealt with the cases of *Tombling v. Universal Bulb Co. Ltd.* [1951] 2 TLR 289 and *Meek v. Fleming* [1961] 2 QB 366; [1961] 3 All ER 148 at 154 in some detail. The latter case is instructive as the Court of Appeal ordered a retrial on the ground of deliberate concealment of material evidence affecting a party's credibility from the Court. The brief facts are that at the trial in October 1960 of an action for false imprisonment and assault in which the main question was whether the plaintiff's or the defendant's account of the circumstances of the plaintiff's arrest by the defendant at Trafalgar Square and his detention at the police station was correct. It was concealed from the Court that in December 1959, while the action was pending, the defendant had been reduced in rank from Chief Inspector to Station Sergeant on a disciplinary charge of having been a party to an arrangement whereby a police constable purported to have arrested a street bookmaker in October 1959, when the defendant was the officer who in fact made the arrest. This matter was known to the defendant's legal advisers, but neither the plaintiff nor his legal advisers had reason to suspect it. It was deliberately concealed from the Court at the trial of the plaintiff's action.

In his judgment Holroyd Pearce LJ endorsed what Denning LJ, as he then was, said in *Tombling's* case (*supra*) relating to the duty of Counsel:

> ...The duty of Counsel to his client in a civil case - or in defending an accused person - is to make every honest endeavour to succeed. He must not, of course, knowingly mislead the Court, either on the facts or on the law, but, short of that, he may put such matters ...as in his discretion he thinks will be most to the advantage of his client...

Having distinguished *Tombling's* case (*supra*) he went on to say:

> In every case it must be a question of degree, weighing one principle against the other. In this case it is clear that the Judge and jury were misled on an important matter. I appreciate that it is very hard at times for the advocate to see his path clearly between failure in his duty to the Court, and failure in his duty to his client.... But in my judgment the duty to the Court was here unwarrantably subordinated to the duty to the client.

In the present case it is clear that the learned Judge was misled on an important matter, that is, the concealment of a document (CP5) as to affect the credibility of a witness even though it did not directly relate to the issue in the action. It is very important for a Counsel to remember that whatever may be his duty to his client his duty to the Court remains paramount in the administration of justice. The appellant believed that the course he took was proper in all the circumstances. He apologised if he was wrong. The learned Judge thought he was wrong. So do we.

The power of summary punishment is a necessary power to maintain the dignity and authority of the Judge and to ensure a fair trail. It should be exercised with scrupulous care and only when the case is clear and beyond reasonable doubt. As Lord Denning MR said in *Balogh v. Crown Court* [1974] 3 ALL ER 283 @ 288.

> ... It is to be exercised by the Judge of his own motion only when it is urgent and imperative to act immediately - so as to maintain the authority of the Court - to prevent disorder - to enable witnesses to be free from fear - and jurors from being improperly influenced - and the like...

This power must be used sparingly but fearlessly when necessary to prevent obstruction of justice. We feel that we must leave the exercise of this awesome power to the good sense of our Judges. We will interfere when this power is misused. We consider that the learned Judge was right in this case to find the appellant guilty. However, we thought the penalty imposed was rather harsh in the circumstances and therefore varied the sentence with the option of a fine.

Also found at [1986] 1 CLJ 169